DRN-5117620

The complaint

Miss B's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Miss B and her husband, Mr R were existing members of a points-based timeshare product provided by a timeshare provider (the 'Supplier').

On 15 July 2012 (the 'Time of Sale'), they purchased membership of a new type of timeshare product (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 2,766 fractional points (the 'Purchase Agreement') at a cost of £46,599. But after trading in their existing timeshare, they ended up paying £10,982 for membership of the Fractional Club.

They paid for their Fractional Club membership by taking finance of £10,982 from the Lender in Miss B's name only (the 'Credit Agreement'). As a result, Miss B is the only eligible complainant here, but as she purchased membership in joint names along with her husband, I'll refer to them both throughout, where appropriate.

Miss B and Mr R made further Fractional Club purchases in 2014 and 2015, but those are not part of this complaint. I'm dealing with the merits of that other complaint in a separate decision.

Fractional Club membership was asset backed – which meant it gave Miss B and Mr R more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Miss B – using a professional representative (the 'PR') – wrote to the Lender on 12 June 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Miss B says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that

was not true.

3. told them that Fractional Club membership was an "investment" when that was not true.
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Miss B says that she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss B.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Miss B says that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, they include the following:

1. They did not receive a copy of the Information Statement prior to the purchase or if they did, they did not have adequate time to review it.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. No adequate or transparent explanation was given to Miss B as to the features of the loan agreement which may have made it unsuitable for her or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age, the high interest rate and the total charge for the credit provided.
7. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The PR also raised a more general concern with the membership. Namely, an alleged lack of availability.

The Lender did not respond to Miss B's complaint within the eight weeks required by the Regulator, so Miss B referred the complaint to the Financial Ombudsman Service. The Lender later sent their final response letter to the complaint on 24 March 2021, rejecting it on every ground.

This complaint had not yet been assessed by an Investigator. But, Miss B and Mr R's aforementioned linked complaint has also been referred to me for a decision, and due to their personal circumstances, they've asked that a decision be made as a priority.

So, in the interests of expediency for both parties, I decided to issue a provisional decision on both complaints at the same time, as I was satisfied that I had sufficient information and evidence to do so.

I issued that provisional decision on this case on 16 October 2024. In that decision, I said:

"***Section 75 of the CCA***

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Miss B could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged. One of these is the price of the goods or service. The purchase price must be more than £100 but no more than £30,000.

In this case, I can see that the purchase price prior to trade-in was £46,599 i.e., over £30,000. As it is the purchase price of the product or service that needs to be taken into account, and the purchase price here is in excess of £30,000, a claim under Section 75 relating to the purchase cannot succeed.

But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under Section 75A can only relate to a 'breach of contract' – misrepresentation isn't included. Looking at Miss B's claim I am satisfied it includes an element which is an alleged breach of contract, so this could potentially be considered under Section 75A. Namely, her concern relating to availability.

There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because, as I go on to explain below, whether it be under Section 75 or 75A, I do not think that the Lender was unfair or unreasonable when it rejected Miss B's claim.

Miss B has said they could not holiday where and when they wanted to due to issues with availability. On my reading of the complaint, this suggests that she considers that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Miss B and Mr R states that the availability of holidays was/is subject to demand. And, from what the Supplier has to say, they did use their membership to holiday on more than one occasion.

I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Miss B has also said there was a lack of exclusivity, given the fact that the Supplier's resorts were open to be booked by people who weren't members. But, while those who weren't Fractional Club members might have been able to holiday at the Supplier's resorts, I can't see that this meant Miss B and Mr R didn't receive what they were entitled to as members under the Purchase Agreement.

For these reasons, therefore, I do not think the Lender is liable to pay Miss B any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 and/or Section 75A claim in question.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

Miss B also says that the credit relationship between her and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that she has concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Miss B and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Miss B's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide

for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

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[1] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Miss B and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of 1-4 above on the fairness of the credit relationship between Miss B and the Lender.

The Supplier's sales & marketing practices at the Time of Sale

Miss B's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Miss B and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Miss B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Miss B was actually unaffordable before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Miss B. If there is any further information on this (or any other points raised in this provisional decision) that Miss B wishes to provide, I would invite her to do so in response to this provisional decision.

Miss B says that she and Mr R were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. She was also given a 14-day cooling off period and she has not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Miss B and Mr R made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[2], so I've considered what Miss B has had to say with this in mind.

They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Miss B and Mr R were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Miss B and Mr R's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR also said in the letter of complaint that the Supplier told them that membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Miss B and Mr R's membership plainly did have an investment element to it.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Miss B has concerns about the way in which their Fractional Club membership was sold, she hasn't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons she alleges. And I say that because beyond the bare allegations, little to no evidence has been provided to support them, including in Miss B's testimony about what happened at the Time of Sale.

I'm not persuaded, therefore, that Miss B's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

<u>Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?</u>

The Lender does not dispute, and I am satisfied, that Miss B and Mr R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr B and Mrs R's share in the Allocated Property clearly, in my view, constituted an

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[2] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Miss B and Mr R as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Miss B and Mr R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Miss B and Mr R as an investment. For example, in Miss B and Mr R's signed Member's Declaration it said:

> *"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."*

And, in the Information Statement, it said:

> *"Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain."*

And:

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

And:

> *"11. Investment Advice*
>
> *The Vendor, any sales or marketing agent or any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisers authorised by the Financial Conduct Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences and investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."*

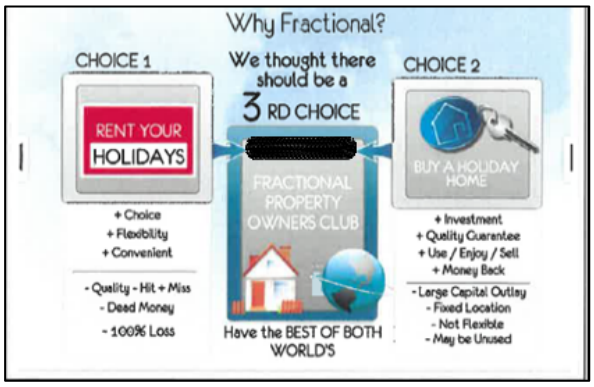
However, during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Miss B and Mr R would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Miss B and Mr R Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Miss B and Mr R.*

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "Why Fractional?" indicates that sales representatives would have taken Miss B and Mr R through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Miss B and Mr R that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Miss B and Mr R the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"[3] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Miss B says that the Supplier positioned membership of the Fractional Club as an investment to them. And, as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Miss B and Mrs R. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I accept that it is possible that Fractional Club membership was marketed and sold to Miss B and Mr R as an investment in breach of Regulation 14(3).

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Miss B rendered unfair?

I've considered what impact any potential breach had on the fairness of the credit relationship between Miss B and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

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[3] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".*
https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Miss B and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Miss B, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

It's possible that Miss B and Mr R were interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint.

But, even if they were, having taken the opportunity in their initial testimony to set out their reasons for buying the membership and what affected their enjoyment of it, they said (referring to the difference between their previous points-based membership and the Fractional Club):

> *"The kids did not want our Points and so this sounded like a better idea than staying in Points as they lasted for longer, if not forever. We were led to believe that the maintenance would be less for Fractions and that the fees for Points were going to go up a lot more."*

The Letter of the Complaint reflects this. And, in their second witness statement, they said:

> *"In any event, the fractional product sounded like a good idea, as we wouldn't be burdening our children with [Supplier] membership in perpetuity."*

What they've had to say also suggests that the main reasons they're unhappy with their timeshare was due to alleged issues with availability and exclusivity, and the increase in maintenance fees.

So, in my view, their purchase was largely motivated by the prospect of a shorter membership term alongside holidays, rather than the investment element.

On balance, therefore, even if the Supplier likely had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Miss B and Mr R's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase

whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Miss B and the Lender was unfair to her.

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Miss B when she and Mr R purchased membership of the Fractional Club at the Time of Sale. But she and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the duration of Fractional Club membership and the obligation to pay management charges for that duration were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Unfair term(s)

Miss B says that the Purchase Agreement contains unfair contract terms (under the UTCCR) in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Miss B and the Lender unfair to her, I'd have to see that the term was unfair under the UTCCR, and that term was actually operated against Miss B in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Miss B, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Miss B have led to any unfairness in the credit relationship between her and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Miss B, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Miss B in any event.

The provision of information at the Time of Sale

Miss B says she and Mr R weren't given sufficient information about the ongoing costs of the membership.

But they haven't expanded on this point with any further detail such as what they were told about the above elements at the Time of Sale, or what information they felt they should have been given that they weren't. It also hasn't been explained how exactly they felt this caused an unfairness in the relationship between Miss B and the Lender.

But, in any event, it seems likely to me that Miss B and Mr R were told by the Supplier at the Time of Sale that the annual maintenance fees, for example, were payable each year and that they may increase. For example, I can see in their Information Statement it explains owners will be required to contribute to the charges for management, repair and maintenance of the property by means of an annual management charge, payable whether weeks are used or not. And, that the charges will be budgeted annually and will be subject to increase or decrease as determined by the costs of managing the project and are payable in advance each year. It also explained that the first year of fees was £1,298.

Miss B also says that they weren't given adequate time to review the standard Information Statement before entering into the Purchase Agreement. But, from what I've seen, they were given this document to review at the same time as all of the other sales documentation.

The letter of complaint also says Miss B wasn't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for her or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age and high interest and total charge for the credit provided.

But they haven't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Miss B. They also haven't described what they feel should have been explained or what information should have been given that wasn't. They've mentioned the length of the loan, her age and the interest rate, but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair.

So, while it's possible the Supplier didn't give Miss B and Mr R sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Miss B's credit relationship with the Lender unfair to her.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Miss B was unfair to her because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Miss B was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

So, in conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Miss B's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate her.

Neither party responded to my provisional decision, nor did they provide any further comments or evidence they wished to be considered.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For these reasons, I do not uphold Miss B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 28 November 2024.

Fiona Mallinson
Ombudsman